

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1143

To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1143

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD E. SAFT,

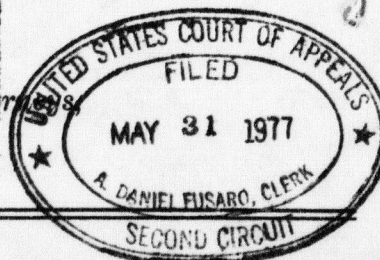
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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COUNTY OF NEW YORK)

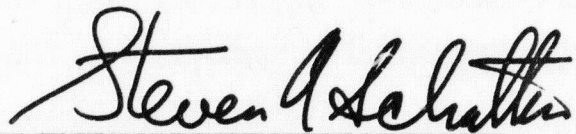
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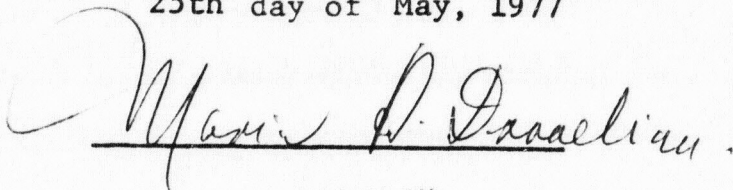
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1143

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD E. SAFT,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Howard E. Saft appeals from an order of the Honorable Lawrence W. Pierce, entered in the United States District Court for the Southern District of New York on February 18, 1977, denying Saft's motion to withdraw his guilty plea to Counts 3, 6 and 22 of Indictment 76 Cr. 414 and from his judgment of conviction entered on March 4, 1977.

Indictment 76 Cr. 414 (LWP) was filed on April 21, 1976, in twenty-three counts. Count One charged Saft and two other defendants, accountants Norman Fialkow and Edward Weizer,* with conspiring, along with deceased

* Fialkow, a member of the Chaikin & Fialkow accounting firm, entered a guilty plea on September 30, 1976 to submitting false financial statements to two banks (Counts Two and Four), and, in connection therewith, agreed to give up his accounting

[Footnote continued on following page]

co-conspirator Leon Chaikin, to file false financial statements for Adlay Jewelry, Inc. ("Adlay") and its subsidiaries for the years 1971 through 1973, inclusive, with banks and other lending institutions and thereby fraudulently causing the said banks and lending institutions to loan or otherwise advance over \$5 million to Adlay and its subsidiaries, in violation of Title 18, United States Code, Section 371. Counts Two through Eight charged Saft and his two co-defendants with having filed false financial statements with four New York banks, in connection with bank loans and other extensions of credit, in violation of Title 18, United States Code, Sections 1014 and 2. Counts 9 through 21 charged Saft and his co-defendants with mail fraud, in violation of Title 18, United States Code, Sections 1341 and 2. Count 22 charged Saft with income tax evasion with respect to in excess of \$100,000 in unreported taxable income for the 1973 calendar year. Finally, Count 23 charged co-defendant Fialkow with perjury in the Grand Jury in violation of Title 18, United States Code, Section 1623.

On September 28, 1976, shortly before the October 5, 1976 trial date, Saft pleaded guilty to Counts 3, 6 and 22 of the Indictment. At the time of the guilty plea, sentencing was set for November 9, 1976. On October 19, 1976, the Government submitted a sentence memorandum to the District Court. On November 3, 1976—six days before the original date for sentencing and subsequent to the preparation of the probation report—Saft notified the court of his intention to move to withdraw his guilty plea.

license. On February 9, 1977, Fialkow was sentenced to a term of imprisonment of one year and one day. Weizer, a junior accountant with that accounting firm, pleaded guilty on September 20, 1976 to being an accessory after the fact and, on November 18, 1976, was fined \$1,000 and placed on probation.

On November 24, 1976, Saft filed his formal motion to withdraw his guilty plea. The only asserted basis for the motion was that he was innocent of the crimes charged and that his guilty plea had been involuntary. In these papers no claim was made that the District Court had failed to comply with the requirements of Rule 11, F.R.Cr.P.

On January 28, 1977, while his motion was under advisement, Saft filed a supplemental memorandum urging that his motion should be granted in the light of *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976), which had been decided on November 1, 1976.

On February 17, 1977, Judge Pierce denied Saft's motion to vacate his guilty plea. On March 3, 1977, the court sentenced Saft to concurrent two year terms of imprisonment on Counts 3 and 6, charging the submission of false financial statements in connection with \$2.2 million in bank loans to Adlay from two federally insured banks, and to a one year term of imprisonment on Count 22, charging tax evasion, to run consecutive to the sentences imposed on Counts 3 and 6.

Saft was continued on bail pending appeal.

Statement of Facts

A. The False Financial Statements and Tax Evasion Scheme.

The indictment against Saft charged him, together with Norman Fialkow and Edward Weizer, two accountants who worked at Adlay's accounting firm, Chaikin & Fialkow, with obtaining \$5,000,000 in loans for Adlay by submitting false financial statements for Adlay and its subsidiaries to four banks and other financial institu-

tions.* When Adlay went bankrupt in June, 1974, the banks and other creditors lost over 80% of their investments.

Adlay's business consisted principally of retail sales of precious jewelry, watches and costume jewelry at jewelry concessions in such department store chains as S. Klein Department Stores, Inc., Robert Hall Village and Clarkins. The retail outlets were located in the metropolitan New York area and in other parts of the United States. Saft was Adlay's president. He owned 75% of Adlay's stock, operated its business, and negotiated various bank loans.

Contrary to what was set forth in the 1971, 1972 and 1973 financial statements and contrary to generally accepted accounting principles, the accountants, as Saft well knew, never supervised the taking of inventory and never checked the inventory for accuracy. The net result was that inventory was arbitrarily valued and falsely inflated. Indeed, an independent certified public accounting firm which conducted a financial investigation in the spring of 1974 concluded that, as of the end of 1973, Adlay's inventory had been inflated by \$1.2 million. Moreover, while overstating assets, the 1972 and 1973 financial statements understated Adlay's liabilities by \$2,000,000 and \$3,000,000, respectively.

In addition, the 1972 financial statements reported that Saft realized a salary of \$52,000. In truth, between 1971 and 1973, Saft caused an Adlay subsidiary to expend

* This statement of Saft's criminal activities is based on the Government's Sentencing Memorandum (G. App. A83-A93), as well as Saft's admissions at the time of his guilty plea. (The Government's Appendix is referred to herein as "G. App.", while Saft's Appendix is referred to herein as "D. App." References to Saft's Brief on Appeal are abbreviated "Br.").

approximately \$200,000 on the remodelling of his custom-built residence in East Hampton. The house was not an Adlay asset and did not benefit Adlay or its subsidiaries; nevertheless, the financial statements disguised and concealed the charges by listing them as an asset entitled "furniture and fixtures." In addition, whereas Adlay's 1973 financial statements showed borrowings by Saft of only \$19,000, Saft's actual "borrowings," as shown by Adlay's books and records, came to \$248,000 as of the end of 1973 (without taking into account any of the amounts expended by Saft on his East Hampton residence). Finally, Saft was siphoning cash directly out of Adlay. In a nutshell, Saft looted Adlay out of \$500,000 between 1971 and 1973.

Adlay was Chaikin & Fialkow's largest client. In April 1973, Saft agreed to give Chaikin & Fialkow 5% of Adlay's stock at such time as Adlay went public. This completely destroyed Chaikin & Fialkow's independence and rendered that accounting firm unfit to certify Adlay's financial statements. American Institute of Certified Public Accountants ("AICPA"), Code of Professional Ethics, Rule 101(a)(1); AICPA Professional Standards, pp. 731-732, Rule 13.

The monies that Saft took from Adlay were hidden not only from creditors of Adlay, but also from the Internal Revenue Service, resulting in the further charge that Saft understated his taxable income for 1973 by more than \$100,000. In or about the spring of 1974, Saft caused the destruction and disappearance of various records which would have revealed facts pertaining to his looting of Adlay.

B. The Guilty Plea

On September 28, 1976, Saft withdrew his not guilty plea to Counts 3, 6 and 22 and entered guilty pleas to those counts. (G. App. A23-A47; D. App. Ex. C.)

In a lengthy voir dire of the defendant, Judge Pierce sought to establish that Saft was acting voluntarily and with awareness of the constitutional rights which were relinquished upon a guilty plea. Indeed, Judge Pierce went far beyond the requirements of Rule 11, F.R. Cr. P., informing Saft of numerous rights not mentioned in the Rule.

At the outset, after hearing defense counsel's application for entry of the guilty plea to Counts 3, 6 and 22 of the Indictment, the District Court elicited from Saft that he was 53 years old, that he was the founder of Adlay, and that he held a Bachelor of Science degree from Columbia University. During this inquiry the court also determined that Saft had received a copy of the indictment and had read the indictment. Nevertheless, the District Court instructed the clerk to read the pertinent counts of the indictment. The clerk did so and asked whether the defendant understood the charges read to him and how he wished to plead. Saft replied, without equivocation, that he understood each charge and pleaded guilty to each.

Judge Pierce then inquired himself whether Saft "fully" understood the charges against him. Saft said, "I do, Your Honor". After determining that the defendant had gone over the indictment with his attorney, that his attorney had explained the charges to him, that he told his attorney everything that he knew about the case and had held nothing back, Judge Pierce proceeded to ascertain that Saft understood that he was waiving a long list of rights in choosing to plead guilty. Judge Pierce specifically mentioned the following rights which would be available to Saft if he did not plead guilty:

- (1) the right to a speedy trial,
- (2) the right to a public trial,

- (3) the right to a jury of twelve,
- (4) the presumption of innocence,
- (5) the requirement of proof beyond a reasonable doubt,
- (6) the requirement of a unanimous verdict,
- (7) the right to confront and to cross-examine witnesses,
- (8) the privilege against self-incrimination and the right to have no adverse inference drawn from invocation of the privilege,
- (9) the right to testify on one's own behalf,
- (10) the right to subpoena witnesses and evidence, and
- (11) the right to waive a jury trial and proceed to trial before a judge.

Having detailed this full array of constitutional rights and obtained the defendant's repeated acknowledgment that he was aware of these rights, Judge Pierce nevertheless asked whether Saft realized that if he gave up these rights, the court could impose sentence on him just as if a jury had rendered a guilty verdict against him. Saft acknowledged that he understood that.

The District Court then enumerated the maximum sentence on each count and also aggregated the maximum penalties on all three counts, asking if Saft understood these possible punishments. Saft said that he understood. The court then inquired about any promises and determined that the only agreement was for dismissal of open counts at time of sentence. The court next asked the defendant if his guilty plea was induced by any promises, statement or predictions that he would get any leniency or consideration by pleading guilty rather than going to trial. Saft said "No." Similarly, Saft denied that he was induced to plead guilty by reason of fear or threats.

Before proceeding further, Judge Pierce gave Saft an opportunity to ask the court any questions about the charges or the consequences of pleading guilty. Saft had no questions. The court then asked if Saft was pleading guilty because he believed that he was guilty of the charges. Saft said "Yes, Sir."

After ascertaining that the Government represented that it not only had a prima facie case, but indeed could prove the charges beyond any reasonable doubt; that there was no legal defense of which defense counsel was aware if Saft and his counsel went to trial; and that Saft still wished to plead guilty, a factual basis for the plea was taken.

In a colloquy that covers nine pages of transcript, Saft acknowledged that he knew that Adlay's 1972 financial statements falsely stated that Chaikin & Fialkow, Adlay's supposedly independent accounting firm, had supervised the taking of physical inventory, when in fact the accountants had never supervised the taking of physical inventory. (G. App. A35-A36). In addition, Saft admitted that the financial statements were false and misleading in that Saft was deriving monies from Adlay and its subsidiaries in excess of the salary and borrowings shown on those statements. (G. App. A35-A36). Saft also acknowledged that the false financial statements were submitted to the Empire National Bank (Count 3) and National Bank of North America (Count 6) to obtain two million dollars in loans for Adlay, and that this was done "to influence the actions of that bank." (G. App. A38).

As to the tax evasion count (Count 22), Saft admitted that he and his wife filed a joint income tax return for the 1973 calendar year which reported Saft's taxable income as approximately \$34,000 for that year and which reported the tax due and owing as \$9,626.20. Saft further

admitted that his taxable income for the said year was at least \$75,000 on which he owed \$10,000 to \$20,000 more in taxes than his tax return indicated. Saft also acknowledged that his purpose in filing the false return was an attempt on his part to evade and defeat the tax fully due, that he intended to do what he did, and that he knew that it was a violation of the law to do what he did at the time. (G. App. A40-A44).

The District Court found the guilty pleas acceptable, directed their entry and set the case for sentencing on November 9, 1976.

C. Saft's Motion to Withdraw the Guilty Plea and Judge Pierce's Opinion Denying the Motion.

Following the preparation of the pre-sentence report and the filing of the Government's sentencing memorandum, and only six days before the scheduled sentencing date, the District Court was informed that Saft had retained new counsel who would move to withdraw the guilty plea. An adjournment of sentencing was granted and a date was set for submission of papers.

On November 23, 1976, the motion was filed. The only asserted ground for the motion was Saft's claim that the plea was involuntary and entered at the behest of his prior attorney. No mention was made in the initial papers of any purported failure to comply with Rule 11 or with *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976), decided several weeks before the filing of these papers. However, in supplemental papers filed on January 28, 1977, while the motion was *sub judice*, Saft added, as a further basis for withdrawal of the motion, the claim that Rule 11 had been violated and *Journet* required that the plea be vacated.

Judge Pierce filed an opinion on February 17, 1977 denying the motion. The District Court found, among other things that:

"This Court, upon listening carefully to the defendant's answers during the allocution and observing his demeanor, was fully satisfied that the plea of guilty was a knowing and voluntary decision, made following consultation with counsel. Defendant Saft clearly is a well-educated and sophisticated man This Court does not believe that a plea is rendered involuntary simply because a defendant, following a plea, changes his mind and decides that he might be better off proceeding to trial or retaining different counsel." (D. App. Ex. D., p. 1).

Judge Pierce went on to deny Saft's claims that his former attorney had improperly pressured him into a guilty plea. The Court concluded:

"[U]pon a review of Saft's own affidavit and the affidavit of his former attorney, it is clear that contrary to his allegations, Saft did admit guilt to his former attorney in the course of their preparation for the plea allocution. The Court concludes that Saft's former counsel did not 'importune' the defendant." (D. App. Ex. D., pp. 1-2).

Turning to the specifics of Saft's contentions as to lack of voluntariness, Judge Pierce found that:

"Saft claims that his former counsel strenuously advised him that he should take a plea to three counts instead of going to trial on twenty-two counts; that Saft might receive a longer sentence if he went to trial and was convicted on multiple counts; that it would be difficult to empanel an impartial jury; that the trial would be

long, arduous and highly publicized; that the Government had the testimony of at least one of his co-defendants; that the Government had evidence that Saft had destroyed documents as well as evidence that demonstrated Saft's prior knowledge of the crimes involved. Finally, Saft alleges that his attorney had to rehearse him over and over again to prepare him for the plea allocution.

The Court does not find that these statements, assuming arguendo they were made, constitute misconduct or undue pressuring on the part of the former attorney." (D. App. Ex. D., p. 2).

Finally, Judge Pierce also ruled:

"Having found that Saft admitted guilt to his counsel, having taken the plea and observed the demeanor of the defendant, and having determined at that time that the plea was voluntary, the court has read nothing in the submissions that leads it to conclude otherwise now." (D. App. Ex. D., p. 2).

Judge Pierce rejected Saft's contention based on *United States v. Journet*, *supra*, holding that that decision should not be applied retroactively to a guilty plea entered before *Journet* was decided. The District Court held that the technical requirements of *Journet* constituted a significant departure from past practice and precedent in the Southern District of New York and in this Circuit as to which application of the "each and every" standard would mandate the vacating of scores of guilty pleas entered in the District Court. Judge Pierce further determined that retroactive application of *Journet* would have a substantial impact upon the administration of justice. The court also found that any technical deficiencies in the allocution did not create any cognizable defects in the taking of Saft's guilty plea.

ARGUMENT

The District Court Did Not Abuse Its Discretion In Denying Saft's Motion To Withdraw His Guilty Plea.

In reviewing denials of motions to withdraw a guilty plea, this Court has held that such motions are addressed to the discretion of the District Court and the defendant has the burden of showing that there are grounds for the withdrawal. *United States v. Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971); *United States v. Fernandez*, 428 F.2d 578 (2d Cir. 1970); *United States v. Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied sub nom. Prezioso v. United States*, 382 U.S. 939 (1965). The trial judge's determination whether that burden has, or has not, been met will be upset on appeal "only if clearly erroneous". *United States v. Lombardozzi*, *supra*, 436 F.2d at 881; *United States v. Podell*, 519 F.2d 144, 148 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975); *United States v. Hughes*, 325 F.2d 789, 792 (2d Cir. 1964).

A. The District Court Complied with the Requirements of Rule 11.

Saft's first claim on appeal is that the District Court did not comply with Rule 11 in taking his plea. Although defense counsel attempt to take Judge Pierce to task for what they claim were "obvious" violations of the Rule, (Br. 15), it should be noted at the outset that experienced appellate counsel were unable to discover any such violations until three months after they were retained to move to withdraw the plea. Thus, although they were retained on November 3, 1976, two days after this Court's decision in *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976), when their papers were filed on November 24, 1976, no mention was made by defense counsel of any of the

purported Rule 11 violations which are now described as "obvious". The violations were so "obvious" that it took two more months before well-recognized defense counsel, who have utilized four attorneys on this appeal, even noticed them. No doubt, defense counsel carefully reviewed and re-reviewed the plea minutes seeking a basis to support Saft's desire to withdraw his plea. Yet these efforts only yielded a belated claim that Rule 11 had been violated and that *Journet* required that the plea be vacated.

Given the care with which Judge Pierce examined Saft at the time of his plea, it is not surprising that defense counsel were initially unable to see any possible claim of a violation of Rule 11. The claim now made consists essentially of an argument that unless the provisions of Rule 11 are read word by word, the plea must be invalidated. *Journet* required no such thing, as *United States v. Michaelson*, Dkt. No. 76-1559, slip op. 2615 (2d Cir. March 31, 1977) made clear.

While holding that "each district judge must personally inform the defendant of each and every right and other matter set out in Rule 11", *Journet* does not say that the provisions of Rule 11 must be delivered *in haec verba*. Indeed, as noted in *United States v. Michaelson*, *supra*, the opinion in *Journet* was corrected after filing to explain that, in light of the local practice not to place a defendant under oath at the time of the plea, it was merely "advisable" rather than mandatory for the District Court to warn a defendant, pursuant to Rule 11(c)(5), that if under oath, he could be prosecuted for perjury committed during the allocation. 544 F.2d at 637, n.6. In *Michaelson*, the failure to give that warning was found not to require that the plea be set aside. *Cf. Del Vecchio v. United States*, Dkt. No. 76-2165 (2d Cir. May 24, 1977).

More importantly, in *Michaelson*, this Court declined to vacate the plea even though the District Court concededly failed to advise the defendant of his right at trial not to be compelled to incriminate himself, as required by Rule 11(c)(3). The fact that other parts of the record reflected the defendant's awareness of this right caused the Court to conclude that it would be "a needlessly rigid construction of Rule 11" to vacate the plea in those circumstances.

This case clearly presents a far easier situation than did *Michaelson*, since the District Court essentially advised Saft of everything required by Rule 11, the sole exception being the District Court's failure to warn Saft that if he were under oath, a false statement could result in a perjury prosecution. However, since Saft was not under oath, as *Michaelson* holds, the failure to give that advice does not warrant vacating the plea. The remaining claims of violations of Rule 11 are as follows:

1. The Nature of the Charge (Rule 11(c)(1)).

Saft claims that Judge Pierce never advised him of the "nature of the charge to which the plea is offered," Rule 11(c)(1), F.R.Cr.P. Even in his belated motion claiming violations of Rule 11, this contention was entirely omitted. The failure to raise in the District Court a claimed violation of Rule 11 precludes appellate review of the issue. *United States v. Hermann*, 524 F.2d 1103, 1104 (2d Cir. 1975); *Fields v. United States*, 438 F.2d 205 (2d Cir.), cert. denied, 403 U.S. 907 (1971).

However, in any event, as the transcript of the September 28, 1976 guilty plea makes manifestly clear, Judge Pierce had each of the three counts to which Saft was pleading guilty read to him. After the reading of

each charge, Saft acknowledged to the clerk that he understood the charge. In addition, Saft acknowledged to Judge Pierce that he understood the charges. Judge Pierce further ascertained that Saft previously read the indictment, had conferred with counsel with respect to the charges, and that counsel had explained the charges to him. Finally, in probing for the factual basis for the plea, Judge Pierce reviewed in detail the facts supporting each element of the crime to which Saft was pleading.

In attempting to show that these actions by the District Court did not suffice to inform him of the nature of the charges, Saft argues that the 1975 amendment to Rule 11 created an additional requirement that the judge must conduct a "discussion of the elements of crimes or what the government would have to prove in order to establish guilt." (Br. 23). Apart from this *ipse dixit*, Saft presents no legislative history or case law stating that the amendment contemplated this as an additional requirement in each and every case. Indeed, the legislative history makes clear that this requirement did not change existing law and contemplated that the requirement could be met in various ways depending on the nature of the case. See Advisory Committee Notes.*

* The Advisory Committee Notes state as follows:

"Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA Standards Relating to Pleas of Guilty § 1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402(a)(2) (1970), Ill. Rev. Stat. 1973, ch. 110A, § 402(a)(1). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, The Judge's Responsibility on a Plea of Guilty, 62 W.V.L. Rev. 213, 220 (1960); Resolution of Judges of U.S. Dis-

[Footnote continued on following page]

In *Irizarry v. United States*, 508 F.2d 960, 965 n.4 (2d Cir. 1974), on which the defendant heavily relies, this Court stated that the mere reading of the indictment, containing a complex conspiracy charge, without more, did not satisfy the requirements of old Rule 11 in that case. However, as was later made clear by this Court in *Seiller v. United States*, 544 F.2d 554 (2d Cir. 1975) and *Kloner v. United States*, 535 F.2d 730 (2d Cir. 1976), where the defendant was pleading to simple and straightforward charges, a reading of the indictment would satisfy the provisions of the old Rule 11. In light of the Advisory Committee Notes to the new Rule 11, contemplating the continued viability of prior law, in a case where the defendant was pleading guilty to crimes which set forth the elements in straightforward terms, a reading of the indictment similarly satisfies the provisions of amended Rule 11.

Saft's reliance on *Irizarry v. United States*, *supra*, is misplaced not only because he has failed to recognize the impact of this Court's subsequent decisions in *Seiller v.*

trict Court for D.C., June 24, 1959.

In turn, the law review article cited in the Advisory Committee Notes states, in pertinent part, as follows:

"[T]he judge should always very carefully confront the defendant with the exact nature of the charge. In some instances he can do this best by reading the indictment, but the West Virginia Supreme Court of Appeals said it was not required by law that it be done in this manner. In many cases the indictment, which is usually couched in technical language, is more understandable to the defendant if the charge is explained to the defendant by the judge in simple everyday language." Thompson, *The Judge's Responsibility on a Plea of Guilty*, 62 W. Va. L. Rev. 213, 220 (1960).

It is clear that the Advisory Committee intended no hard and fast rule prescribing how the court should inform the defendant of the charges. Nor was any change in existing practice intended.

United States, supra, and *Kloner v. United States, supra*, but also because he fails to note that in *Irizarry* the defendant never acknowledged that he understood the nature of the charge. 508 F.2d at 966. Here Saft acknowledged his understanding of the nature of the charges several times, and, in addition, acknowledged that he had read the indictment and reviewed the charges with his attorney. In determining that these acknowledgements were meaningful, the District Court could properly take into account that Saft was a "well-educated and sophisticated man" with an advanced degree in business and a substantial business background. (D. App. Ex. D p. 1). *Seiller v. United States, supra*, 544 F.2d at 563; *Irizarry v. United States, supra*, 508 F.2d at 964 n.3; *Thunder v. United States*, 477 F.2d 1326, 1328 (8th Cir.), *cert. denied*, 414 U.S. 873 (1973).

Entirely apart from the explanation of the charges provided to Saft by his lawyer, a man of Saft's background could be reasonably expected to comprehend these charges from a reading of the indictment which, contrary to Saft's contention, spelled out the elements of each offense. The requisite intent was clearly stated in each count. As to Counts 3 and 6 the false bank loan applications, Saft himself stated that he submitted the false applications "[t]o influence the action" of the respective banks in making \$2 million in loans. (D. App. Ex. C pp. 14, 16).* As to the well-known crime of tax evasion,

* Counts Three and Six charged that, in violations of Title 18, United States Code, Section 1014, the defendant "unlawfully, wilfully and knowingly did make and cause to be made false statements . . . for the purpose of influencing the action of . . . a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan. . . ." A standard jury charge describing the elements of this crime states as follows: (1) that the defendant either made, or caused to be made, a false statement upon or in an application for a loan; (2) that

[Footnote continued on following page]

charged in Count 22, again the indictment itself set forth the elements of the crime.*

the defendant knew the statement or report to be false; (3) that the statement was made in a loan application to a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation; and (4) that the false statement was made for the purpose of influencing the bank's action on the loan application (Adapted from Judge Weinfeld's charge in *United States v. Sabatino*, aff'd, 485 F.2d 540 (2d Cir. 1973)). A brief comparison of the *Sabatino* charge with the indictment demonstrates that the elements of the crime are clearly stated in the indictment.

Contrary to Saft's contention, (Br. 24), no discussion of materiality is required. *United States v. Sabatino*, *supra*. There can be no doubt here but that the false statements to which Saft allocuted, including, *inter alia*, the failure to disclose his looting of Adlay, were intended to influence the banks within the meaning of Title 18, United States Code, Section 1014. See *United States v. Simon*, 425 F.2d 796, 806 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).

* In Count 22 the indictment charged that:

"On or about the 15th day of April 1974, in the Southern District of New York, Howard E. Saft, the defendant, who during the calendar year 1973 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1973, by preparing and causing to be prepared, by signing and causing to be signed, and by filing and causing to be filed with the Internal Revenue Service, an income tax return on behalf of himself and his wife, wherein it was stated that he and his wife had \$33,810.23 taxable income for the year 1973 and that the amount of income tax due and owing thereon was \$9,626.30, which return was false and fraudulent, as he then and there well knew, in that their taxable income for the year 1973 was in excess of \$140,000, and that for year 1973 there was due and owing to the United States thereon an income tax of in excess of \$90,000."

A standard charge on the elements of tax evasion states as follows:

(1) That the defendant received substantial taxable income in addition to that reported in the return for the

[Footnote continued on following page]

In sum, this is not a case where there is some serious question that a defendant pleaded guilty to a charge which he did not understand. Saft has never claimed that he misunderstood the charges, a claim which, if made, would be highly implausible. Judge Pierce had these straightforward, self-explanatory charges contained in the indictment read to Saft and Judge Pierce obtained Saft's repeated acknowledgments that he understood the charges. These efforts and inquiries clearly met the requirements of Rule 11.

year in question, upon which unreported income additional Federal income tax was due and owing;

(2) That the defendant made an attempt to evade or defeat the tax; and

(3) That he did so wilfully. Charge of Judge Weinfeld in *United States v. Bugliarelli*, 75 Cr. 333 (EW) *aff'd without opinion*, 538 F.2d 315 (2d Cir.), *cert. denied*, 426 U.S. 920 (1976).

Again, as with Counts 3 and 6, the indictment itself fully sets forth each element of the crime.

Saft cites *McCarthy v. United States*, 394 U.S. 459, 467-68 n. 20 (1969) for the proposition that "explication" of the elements of tax evasion is essential to accepting a plea to that crime because the charge can involve a lesser included offense. However, the footnote cited merely states that "personally addressing the defendant as to his understanding of the essential elements of the charge" is a necessary prerequisite. This comment, made in the context of a case where the indictment was not read to the defendant and the court never asked the defendant whether he understood the charges, does not even begin to suggest that Judge Pierce's inquiries here were insufficient. Moreover, in *McCarthy*, the defendant's minimal allocution went no further than his statement that his failure to pay taxes was "not deliberate," 394 U.S. at 461, creating concern that the defendant may have only believed himself to be guilty of a lesser included offense. By marked contrast, in this case, Saft admitted to wilful tax evasion, committed with knowledge that he was violating the law.

2. The Right to Plead Not Guilty or to Persist in That Plea (Rule 11(c)(3)).

Saft next claims that Judge Pierce did not advise him of his Rule 11(c)(3) right "to plead not guilty or to persist in that plea if it has already been made." This contention, like the others, is constructed on a hyper-technical reading of Rule 11 which assumes that unless the language of Rule 11 is recited word for word, the District Court's warnings should be held to be inadequate. Here, in his meticulous voir dire Judge Pierce sought to give warnings far beyond those required by Rule 11, and in doing so, there can be no doubt but that he alerted Saft to his right to persist in his not guilty plea.

Thus, at the outset the court had the clerk determine how Saft offered to plead:

"The Court: The clerk will read counts 3 and 6 and 22 to defendant and see how he offers a plea to each of those counts.

(Clerk reads Count 3.)

The Clerk: You understand the charge on Count 3?

The Defendant: Yes.

The Clerk: How do you offer a plea on Count 3?

Mr. Fox: With respect to the limitation that we have already set forth, your Honor, Mr. Saft is pleading to knowledge of the falsity of the 1972 statement only.

The Court: Is it your understanding that that is embraced within the charge enumerated in Count 3?

Mr. Fox: Yes, your Honor.

The Court: All right, go ahead. How do you offer to plea to that, sir?

The Defendant: I plead guilty, sir, to that.

The Court: All right. Count 6?

(Clerk reads Count 6.)

The Clerk: You understand the charge on Count 6?

The Defendant: Yes, sir, I do.

The Clerk: How do you offer to plead to that Count 6?

The Defendant: I plead guilty.

(Clerk reads Count 22.)

The Clerk: Do you understand the charge on Count 22?

The Defendant: Yes, sir, I do.

The Clerk: How do you offer to plead to that Count 22?

The Defendant: I plead guilty."

Next the court began telling Saft all of the rights he had if he chose not to plead guilty:

"The Court: And you understand that if you did not plead guilty to these charges you would have a right to a speedy and public trial by a jury of twelve people?

The Defendant: Yes, your Honor.

The Court: And that upon such a trial you would be presumed innocent unless and until the government established your guilt beyond a reasonable doubt to the satisfaction of all 12 jurors?

The Defendant: Yes."

After reciting the whole range of rights which Saft was giving up, the court reiterated that if the offer to plead guilty was accepted, these rights were relinquished and sentence could be imposed just as though a jury verdict had been rendered against Saft on each charge:

"The Court: You understand if your offer to plead guilty to these charges is accepted, you give up these rights with respect to the charges against you and the Court can impose sentence upon you just as if a jury had brought in a verdict of guilty on each of these charges against you?

The Defendant: Yes." (G. App. A4-A5, A29-A31).

In giving Saft this full and complete list of rights available to him if he chose not to plead guilty, Judge Pierce discharged his duty to inform Saft of his right to persist in a not guilty plea. Clearly, if a defendant is told of the many rights which are only relinquished upon his own, voluntary choice to plead guilty, inherent in the advice is the fact that he is entitled to insist on those rights by persisting in his not guilty plea.

That Saft clearly understood at the time of his guilty plea that he had the right to persist in his not guilty plea and that by pleading guilty, he was giving up that right is made clear by his affidavit, sworn to November 22, 1976 (G. App. A3-A22), which, *inter alia*, states:

"In the face of my attorney's newly stated doubt, I continued to insist upon my innocence. However, in the third week of September, my counsel strenuously advised that I accept a plea to three counts of . . . dictment. . . . After reiterating the above reasons why I should plead guilty, my counsel said I say that the decision was mine to make." (G. App. A12-A 3; see also G. App. A14, A16).

In the face of this explanation by Saft of his own knowledge that he could choose to plead guilty or not to plead guilty, and in the face of Judge Pierce's detailed explanation of Saft's rights if he chose not to plead guilty, the claim that Saft was not advised of the right to plead not guilty is without merit. *United States v. Michaelson, supra.*

3. The Right to Counsel (Rule 11(c)(3)).

Saft claims that Judge Pierce did not inform him that he had the right to counsel at each stage of the proceedings, as provided in Rule 11(c)(3), F.R.Cr.P. However, again, during the course of the allocution this matter was covered, in a way which unmistakably alerted Saft to his right to counsel during the proceedings against him. At the outset Saft, who had appointed counsel at his side,* was asked the following:

"The Court: Have you gone over this indictment with your attorney——

The Defendant: I have, sir.

The Court: ——after receiving a copy of it, correct?

The Defendant: Yes, sir.

The Court: And he has explained to you what the charges are you offering to plead guilty to?

* This was not a case where an unsophisticated defendant, previously unrepresented, had limited access to court-appointed counsel. Both Saft's Affidavit (G. App. A15) and that of his assigned-counsel (G. App. A55-A57), disclose that Saft and his assigned counsel spent considerable time in both pretrial preparation and in discussing about the guilty plea. On the latter matter, Saft's affidavit avers that:

"Mr. Fox rehearsed it [the procedure for the allocution] with me over and over again." (G. App. A15).

The Defendant: Yes, sir.

The Court: And you fully understand these charges?

The Defendant: I do, your Honor.

The Court: And have you told your attorney everything you know about the case?

The Defendant: Yes.

The Court: Have you held anything back from him with reference to these charges?

The Defendant: Nothing." (G. App. A29).

And further on in the Court's allocution, the following ensued:

"The Court: Mr. Fox, you know of no legal defense which would prevail if you went to trial and you know of no reason why defendant should not plead guilty to these charges?

Mr. Fox: That is correct.

The Court: And you still wish to plead guilty to these three charges?

The Defendant: Yes." (G. App. A34-A35).

Moreover, the Court shortly after the arraignment had made certain that Saft was fully protected in his right to counsel by advising him on April 29, 1976 to go to the Magistrate and receive the benefit of assigned counsel.* Saft did so in early May, 1976 (G. App. A11).

* Even before his indictment, Saft was represented by counsel, *i.e.*, the firm of Louis Bender, Esq., Sandor Frankel, Esq., of counsel, who served as Saft's counsel throughout the grand jury proceedings. (G. App. A95).

That Saft clearly understood he had the right to counsel at trial is made repeatedly clear by his affidavits on the motion. Thus, Saft, in his initial affidavit, stated that prior to the opening of serious plea discussions in the latter part of September 1976, "my attorney and I had looked forward to trial as the ultimate forum for proving that I am not guilty of the crimes charged." (G. App. A12). If there were still any doubt that Saft knew and understood at the time of his plea that, if he went to trial, he had the right to counsel, this knowledge and understanding is made clear by his statement that he had been allegedly advised by Mr. Fox:

"In Federal Court, my counsel could not directly question prospective jurors, only the judge could, and that we, therefore, would have a very difficult time getting an impartial jury of my peers." (G. App. A13).

4. The Guilty Plea Waives Any Kind of Trial (Rule 11(c)(4)).

Last, Saft complains that he was not informed that if he pleaded guilty, he was waiving a trial of any kind. Rule 11(c)(4). This advice was in fact conveyed to Saft repeatedly as Judge Pierce told him not only of his right to a jury trial, but of his right to a bench trial if he chose not to plead guilty:

Thus the Court inquired of Saft:

"And you understand that if you did not plead guilty to these charges you would have a right to a speedy and public trial by a jury of twelve people?

The Defendant: Yes, your Honor" (G. App. A29).

* * * * *

"The Court: You understand if you wanted to you could have a trial before a Judge without a

jury in which the burden would be on the Government and you would have the same constitutional rights?

The Defendant: Yes, your Honor." (G. App. A30).

This point was reiterated by the judge on the following terms:

"The Court: You understand if your offer to plead guilty to these charges is accepted, you give up these rights with respect to the charges against you and the Court can impose sentence upon you just as if a jury had brought in a verdict of guilty on each of these charges against you.

The Defendant: Yes." (G. App. A31).

If all this were not enough, Saft's own affidavit, sworn to November 22, 1976, avers that his counsel told him that his plea of guilty would mean that there would be no trial. (G. App. A12-A13, ¶¶ 1, 3, 4, 5, and 6). Saft also averred that he knew at the time of his plea that his alternatives "were pleading guilty to three counts of the indictment, or going to trial. . . ." Saft Aff., p. 12 (G. App. A14).

B. A Different Standard of Review Prevails as to Pleas Taken Before This Court's Decision in *Journet*.

Although this Court need not reach the question of *Journet's* retroactivity since the guilty plea met the requirements of amended Rule 11, it is apparent that a somewhat different standard of review is appropriate for guilty pleas accepted before the decision in *Journet*. As Judge Pierce noted, the holding of *Journet*, requiring a

recitation of "each and every" element of amended Rule 11 was a significant departure from the past practice in this District, where many district judges, like Judge Pierce, gave lengthy and detailed warnings of rights going far beyond the requirements of Rule 11, though not necessarily couched in the precise words of the Rule. Like the plea here, the essentials of Rule 11 were conveyed in one form or another, but the plea becomes subject to attack, despite the fact that the substance of Saft's rights were communicated to him, merely because the actual wording of Rule 11 was not used. To meet this problem, which could grow to great dimensions, we urge that this Court find, as did Judge Pierce, that a more liberal standard of review applies to a plea taken before *Journet* was decided.*

The language of *Journet* itself is couched in terms of intent to afford prospective application to guilty pleas occurring after the decision. Thus, the Court of Appeals stated:

"We now hold that, as a minimum, before accepting a guilty plea each district judge must personally inform the defendant of each and every right and other matter set out in Rule 11." 544 F.2d at 636.**

Moreover, controlling support for the prospective application of *Journet* can be found in the Supreme Court's

* Although Saft argues, without any basis whatsoever that the number of cases where guilty pleas might be vacated is "relatively small," the records of the Department of Justice show that one or more defendants in 774 cases entered guilty pleas (or pleas of nolo contendere) in the Southern District of New York between December 1, 1975, the effective date of the amendment to Rule 11, and the date of the *Journet* decision.

** We have previously addressed the recognition of the Court of Appeals that the Rule 11(c) (5) warning was not being given by the District Courts in the Circuit as further evidence of the intent to apply the decision prospectively.

decision in *Halliday v. United States*, 394 U.S. 831 (1969). In *Halliday*, the Supreme Court held that its decision in *McCarthy v. United States*, 394 U.S. 459 (1969), which interpreted the 1966 amendment to Rule 11, was to be given prospective application to apply to only those guilty pleas accepted after the date of the *McCarthy* decision. Similarly, in *Korenfeld v. United States*, 451 F.2d 770 (2d Cir. 1971), the Second Circuit held that its decision in *United States v. Bye*, 435 F.2d 177 (2d Cir. 1970)—which held that at the guilty plea in a narcotics case, a defendant had to be advised of ineligibility for parole—was to be given prospective application only to pleas of guilty taken after *Bye*. The holdings and rationale of *Halliday* and *Korenfeld* are on all fours with the instant case and mandate that the strictures adopted in *Journet* should not be applicable to a plea rendered prior to November 1, 1976.*

Recently Judge Bonsal was faced with precisely the same retroactivity issue as is now before the Court. In describing the difficult position in which the District Court found itself, he stated as follows:

“Only shortly before the *Journet* decision, the Court of Appeals in *Kloner v. United States*, 535 F.2d 730, 733 (2d Cir. 1976), restated the general rule that a guilty plea would not be invalidated merely because the court did not enumerate for a defendant the rights he was waiving by pleading guilty and held that on the basis of the totality of circumstances there had been compliance with

* *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975), upon which Saft purports to rely, is not in point. That case is readily distinguishable, because *Ferguson* represents merely a well-recognized application of *Bye* and *Korenfeld*. The instant case indeed closely resembles *Halliday* because to apply *Journet* retroactively here would result in the wholesale vacating of numerous guilty pleas, since, as this Court recognized, *Journet* reflects a marked departure from existing practice pertaining in the District of this Circuit.

Rule 11. Prior to *Journet* this 'totality of the circumstances' test was thought to define the standard to be applied by district courts in accepting pleas. *United States v. Saft*, Dkt. No. 76 Cr. 414 (S.D.N.Y. February 17, 1977). Considering the purpose of the new rule enunciated by *Journet*, the extent of reliance on the former practice, and the effect that retroactive application would have upon the administration of justice, *Halliday v. United States*, 394 U.S. 831, 832 (1969); *Korenfeld v. United States*, 451 F.2d 770 (2d Cir. 1971), cert. denied, 406 U.S. 975 (1972), retroactive application of *Journet* would clearly be improvident and unwarranted. *United States v. Saft, supra.* *Perez v. United States*, 77 Civ. 951, 76 Cr. 118 (DBB) (S.D.N.Y. April 15, 1977) p. 5 (G. App. A143-A148).

We recognize that since Judge Pierce rendered his decision in this case, this Court, in a case where the retroactivity issue had not been fully briefed or argued, commented in passing that "the argument for non-retroactivity must face the undeniable fact that Congress did prescribe December 1, 1975 . . . as the effective date of the amendments to Rule 11." *United States v. Michaelson, supra* at 2622. However, as this case and *Perez* evidence, District Judges who, before *Journet* had developed plea procedures discussing numerous rights beyond the requirements of Rule 11, may have justifiably relied on *Kloner* and on their belief that they were more than meeting the requirements of amended Rule 11 by going into matters beyond its terms. In conducting this kind of detailed allocution, the District Courts informed defendants, in substance, of elemental matters required by Rule 11, such as their right to persist in a plea of not guilty or the fact that a guilty plea waives a trial of any kind.

In sum, we submit that *Journet* altered prior practice to the extent that many District Judges had developed de-

tailed plea minutes meeting the substance of, and in some instances exceeding the requirements of, Rule 11, but not necessarily incorporating what might well have appeared to be somewhat superfluous language embodied in the Rule. Again we emphasize that distinguished defense counsel, retained to find a basis for vacating this plea were unable to find any arguable Rule 11 violation in these plea minutes until three months elapsed. With this fact in mind, it is not surprising that District Courts, before the *Journet* decision, would not have expected that a plea such as this one would be subject to attack under Rule 11. In reviewing pleas taken before *Journet*, substantial compliance with the requirements of Rule 11 should, we submit, defeat a claim that the plea must be vacated. See *United States v. Michaelson*, *supra*.*

C. The Trial Court Correctly Found That Saft's Plea Was Voluntarily and Knowingly Made.

Saft argues, pursuant to Rule 32(d), F.R.Cr.P., that the trial court abused its discretion in refusing to allow him to withdraw his guilty plea in the face of his subsequent contention that the plea was involuntary.** This contention, like his other arguments, is frivolous.

* Saft cites *United States v. Cortes-Rios*, 76 Cr. 867 (GLG), as a precedent demonstrating that Saft should have been given an opportunity to replead. However, that citation is misplaced. There the guilty plea had been taken *subsequent* to the decision in *Journet* and, moreover, the District Court had failed to advise the defendant of the possibility that he could receive a lifetime period of special parole. *United States v. Cortes-Rios*, 76 Cr. 867 (GLG). Transcript of November 23, 1976. Here, of course, we are dealing with a pre-*Journet* guilty plea, where Saft was advised in substance of all of his pertinent Rule 11 rights.

** Saft also makes a contention, not raised in the Court below, namely, that even if the failure to comply with all of *Journet's* strictures did not violate Rule 11 and even if the plea was otherwise voluntary, such a technical failure to observe the "each and every" mandate of *Journet*, gives rise to defendant's right to revoke his guilty plea under Rule 32(d). This argument adds nothing to the Rule 11 claims previously answered.

On the record below, the Court correctly concluded as follows:

"This Court presided over the taking of Saft's plea of guilty. The transcript of that proceeding demonstrates that Saft's plea was, in the traditional sense of the word, voluntary when made. This Court, upon listening carefully to the defendant's answers during the allocution and observing his demeanor, was fully satisfied that the plea of guilty was a knowing and voluntary decision, made following consultation with counsel. . . . This Court does not believe that a plea is rendered involuntary simply because a defendant, following a plea, changes his mind and decides that he might be better off proceeding to trial or retaining different counsel.

"Although Saft now asserts that he is innocent of the charges, those allegations are in the main conclusory, particularly with respect to Count 22. He claims that his attorney pressured him into a plea; however, upon a review of Saft's own affidavit and the affidavit of his former attorney, it is clear that contrary to his allegations, Saft did admit guilt to his former attorney in the course of their preparation for the plea allocution. The Court concludes that Saft's former counsel did not 'importune' the defendant. . . .

"Indeed, even taking all the factual allegations of defendant's moving papers at face value, the Court does not conclude thereby that the plea was involuntary. The Court does not find itself persuaded that the circumstances eliminated Saft's free will or that he was unduly pressured by his attorney. Rather, Saft's own affidavit reveals that he decided to plead guilty several days before the pleading and that his attorney informed him that, in the final analysis, the decision to plead guilty was Saft's alone. Having found that Saft ad-

mitted guilt to his counsel, having taken the plea and observed the demeanor of the defendant, and having determined at that time that the plea was voluntary, the Court has read nothing in the submissions that leads it to conclude otherwise now." (D. App. Ex. D, pp. 1-2).

Although Saft's discussion of the voluntariness issue proceeds to cite cases from the First, Third, Ninth and District of Columbia Circuits, there is no citation, let alone discussion, of the Second Circuit case upon which Judge Pierce relied, namely *United States v. Lombardozi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971). *Lombardozi*, however, has many similarities to the instant case, as Judge Pierce concluded in holding that:

"A motion to vacate a plea prior to sentence is addressed to the sound discretion of the district judge. See *United States v. Lombardozi* [*supra*.] After a repeated and careful review of the affidavits and the arguments of counsel, and not even considering the affidavit of the prosecutor, but basing the decision primarily on the transcript of the plea proceeding, this Court concludes that Saft's plea of guilty to the three counts in question was knowing and voluntary, and that there was a factual basis for the plea." (D. App. Ex. D, p. 3).

In *United States v. Lombardozi*, *supra*, the defendant moved to withdraw his plea, prior to sentence, on the ground that an Assistant United States Attorney and an FBI Agent had made certain representations about his sentence that were not fulfilled. The District Court found that those officials had said some improper things, but that the plea was not involuntary in view of the defendant's "general sophistication and intelligence." 436 F.2d at 880. The Court of Appeals affirmed, noting that the defendant was not uncounseled or uneducated, and

that the evidence showed that he had made a rational decision to plead guilty. 436 F.2d at 881. Especially pertinent is the holding of *Lombardozzi* as follows (436 F.2d at 881):

"The defendant had the burden of establishing grounds for withdrawal of his plea [citations omitted]. The determination of whether that burden has been met rests within the discretion of the trial judge, whose decision is reversible only if clearly erroneous [citation omitted]. The judge found that the appellant failed to meet that burden by establishing any basis whatsoever for withdrawal of his plea. The findings of the court were supported by ample evidence."

to by Sept the defendant testified at a hearing on

In *United States v. Fernandez*, 428 F.2d 578, 580 (2d Cir. 1970), a case likewise neither cited nor alluded to in his pre-sentence motion to withdraw his guilty plea, "that he was innocent and that his former lawyer advised him to plead guilty despite his protestations of innocence and his desire to proceed to trial." 428 F.2d at 579. The District Court, without hearing testimony from the defendant's former counsel,* found the defendant's allega-

* In *Fernandez*, the defendant refused to permit his attorney to testify. The Second Circuit noted this fact in passing without comment. In the case at bar, Saft, through counsel, refused to permit his former attorney to file a full-blown affidavit setting forth his version of the pertinent facts. See letter of Steven A. Schatten, Assistant United States Attorney, to Honorable Lawrence W. Pierce, dated December 1, 1976. (G. App. A120-A125).

Nonetheless, it is clear that the filing of Saft's affidavit waived the attorney-client privilege as to the matters and issues raised by his affidavit. Wigmore, Evidence § 2327 (McNaughton rev. 1961); McCormick, Evidence § 93 (Cleary ed. 1972); *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888); *United States ex rel. Richardson v. McMann*, 408 F.2d 48, 53, 54 (2d Cir. 1969), *vacated on other grounds sub nom. McMann v. Richardson*, 397 U.S. 759 (1970); *United States v. Woodall*, 438 F.2d 1317, 1322-26 (5th Cir.) (*en banc*), *cert. denied*, 403 U.S. 933 (1971). Thus, the action of Saft's present counsel, in effectively precluding the Government from presenting former counsel's version in detail, was exceedingly questionable.

tions "made up of whole cloth and almost frivolous" and the Second Circuit found that "there is no possible basis for . . . reversal." 428 F.2d 580. See *United States v. Giuliano*, 348 F.2d 217, 221 (2d Cir.), *cert. denied*, 382 U.S. 939, 946 (1965).

In *United States v. Panebianco*, 208 F.2d 238 (2d Cir. 1953), *cert. denied*, 347 U.S. 913 (1954), a case virtually identical to the case at bar, the defendant, prior to sentence, moved to withdraw his guilty plea alleging that he was innocent, and that "I was told by counsel that I did not have a chance to beat the case, that is why I pleaded guilty." 208 F.2d 239 n.1. This Court found no abuse of discretion in the District Court's denial of the motion:

"The appellant pleaded guilty with full knowledge of the nature of the charges against him and on the advice of competent counsel. Before accepting the plea Judge Kaufman was careful to make sure that the defendant was acting voluntarily and without the influence of fear or promises of a lighter sentence. There is no suggestion that he was ignorant of the consequences of his plea." 208 F.2d at 239.

In the case at bar, Judge Pierce carefully elicited from Saft that he has a Bachelor of Science degree from Columbia undergraduate school (D. App. Ex. C.P. 6); that he has gone over the indictment with his attorney and fully understood the charges (D. App. Ex. C.p. 7); that he understood all the rights he was waiving, and the maximum he could receive (D. App. Ex. C. p. 7-11); that he was not "induced to plead guilty by reason of any fear or force or the like" (D. App. Ex. C. p. 11); that he had no questions of the court about the charges; and that he was pleading guilty because he believed he was guilty (D. App. Ex. C. p. 12). Saft's subsequent admissions make it crystal clear that there was a factual basis for the plea.

The gist of Saft's contentions in District Court was that he had repeatedly lied to the court during the allocution because his former attorney had told him that he would be convicted even though he was innocent. However, the papers which Saft himself submitted in support of the motion demonstrated that Saft made an informed and voluntary choice to plead guilty knowing that such a plea should be entered only if he believed himself to be guilty. Thus, in the affidavit that Saft's former counsel filed as part of Saft's own papers, he averred that Saft "did reveal to me certain facts that conflicted with his affirmations of innocence;" that "additional disclosure by the Government together with my own investigation, revealed certain new information which conflicted with Mr. Saft's assertions;" and that "the information I had obtained which conflicted with Mr. Saft's assertions caused me to conclude that, if Mr. Saft went to trial, the Government might well prevail on Counts 2, 6 and 22 of the indictment." Fox Affidavit, sworn to November 22, 1976, pp. 1-3. (G. App. A56-A57). Saft's former counsel also informed Saft that "*he should not enter a plea of guilty unless he believed himself to be guilty.*" (G. App. A57) (Emphasis supplied).*

In light of these facts, which Saft himself submitted in support of his motion, *United States v. Rogers*, 289 F. Supp. 726 (D. Conn. 1968), cited by Saft, is totally

* Saft's initial affidavit stated that Saft's former counsel had advised him that "after reiterating the above reasons why I should plead guilty, my counsel did say that the decision was mine to make." (G. App. A13). Following the receipt of the Government's papers demonstrating the inapplicability of *United States v. Rogers*, 289 F. Supp. 726 (D. Conn. 1968), Saft's reply affidavit alleged that he did not recall and did not believe that his former counsel advised him that he should not plead guilty unless he believed himself to be guilty. (G. App. A130-A131). As the Government's papers demonstrated at length, Saft's affidavits were replete with inaccuracies, misrepresentations and other devices employed to conceal the truth. Affidavit of Assistant United States Attorney Steven A. Schatten, sworn to December 8, 1976, pp. 6-18, 19-23 (G. App. A63-A82).

inapposite. In *Rogers*, the court, in granting a motion to withdraw the guilty plea, considered it crucial that the defendant's counsel never cautioned his client that he should not plead guilty unless he believed himself to be guilty. 289 F. Supp. at 729. In the case at bar, Saft's former counsel swore in an affidavit submitted by Saft, that he *did* tell his client that he should not plead guilty unless he believed himself to be guilty.

Saft also claims that his Rule 32(d) motion should have been granted because the Government would not have been prejudiced thereby. Since Saft's papers did not state a claim on their face, Judge Pierce properly rejected the motion, without giving consideration to the ensuing prejudice to the Government that would have been entailed had the motion been granted. Nonetheless, various forms of prejudice to the Government would ensue by reason of a grant of Saft's motion. Thus, for example, because Saft's guilty plea occurred on the eve of trial, the case which involves a three to five week trial was prepared once and upon a grant of the motion would have to be prepared anew. In addition, following the guilty plea, the Government filed a sentence memorandum which set forth its theory of the case in considerable detail, and the Probation Office filed its report to which Saft enjoyed access. Moreover, due to the additional lapse of time, co-defendants Fialkow and Weizer, who had offered their cooperation, have been sentenced, a fact that may well work to Saft's benefit at trial. Thus, as Saft well knows vacating his plea at this point will be to the Government's clear prejudice.*

* The last arrow in Saft's quiver is his request that, if all else fails, he should be afforded a hearing "to determine whether counsel exerted undue influence on him so as to render his decision to plead involuntary." (Br. 31). Judge Pierce properly denied a hearing on the grounds that Saft made no request for one and, in any event, the material facts were not in dispute. (D. App. Ex. D. p. 3).

In sum, Saft did not make the requisite showing to justify reversal of the lower court's ruling. The record in this case demonstrates that Saft is sophisticated, intelligent and well-educated. He was out on bail throughout the proceedings below and was thus able to consult with counsel, and with a Government-paid accountant hired pursuant to Judge Pierce's authorization. Saft, as well as his court-appointed attorney and accountant, were afforded virtually open-file discovery of the Government's evidence. Considering that Saft pleaded guilty only on the eve of trial, after the Government had furnished extensive discovery and after having sought plea negotiations, it is inconceivable that he did not thoroughly review all the evidence that the Government had marshalled against him. The following language from *Brady v. United States*, 397 U.S. 742, 754-55 (1970), applies equally to Saft:

"[P]rior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to the requirements of the law with respect to guilty pleas."

See *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). It is apparent that, even taking Saft's papers at face value, he did not make the requisite showing and Judge Pierce's ruling was clearly correct.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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